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In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

CHARLES E. SIMS, CHAPTER 11 TRUSTEE OF THE BANKRUPTCY ESTATE OF UNICOM COMPUTER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In a bankruptcy action to avoid a preferential transfer, can the transferee satisfy 11 U.S.C. § 547(c)(2)(C) – the ordinary business terms element of the ordinary course of business exception – by establishing that the challenged transfer was consistent with regional industry practices, as well as with the transferee's longstanding pre-insolvency dealings with the debtor-transferor, or must the transferee as a matter of law prove compliance with a single, uniform set of industry-wide business terms?

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the Ninth Circuit were International Business Machines Corporation and Unicom Computer Corporation. The parties to the proceedings in this Court are International Business Machines Corporation and Charles E. Sims, the Chapter 11 Trustee of the Bankruptcy Estate of Unicom Computer Corporation. Mr. Sims was appointed as Chapter 11 Trustee after the rendering of the judgment sought to be reviewed.

RULE 29.1 LISTING

International Business Machines Corporation has no parent corporation. International Business Machines Corporation has the following subsidiaries (other than wholly-owned subsidiaries):

I/Net, Inc.
Rationale Software Corporation
Marcam Corporation
Parallan Computer Inc.
Ancor Communications, Inc.
Fairway Technologies Associates
Advantis
Technology Service Solutions
Transarc Corporation
IBM Information Systems, Inc.
PC Service Partners, Inc.
Nulogix Technical Services Ltd.

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CHARLES E. SIMS, CHAPTER 11 TRUSTEE
OF THE BANKRUPTCY ESTATE OF
UNICOM COMPUTER CORPORATION,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

International Business Machines Corporation ("IBM") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reprinted at App. 1-10. The opinion of

the United States District Court for the Northern District of California is reprinted at App. 11-20. The opinion of the United States Bankruptcy Court for the Northern District of California is reprinted at App. 26-30. Each of the foregoing opinions is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on April 13, 1994. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion of rehearing en banc was entered on June 2, 1994. [App. 33]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

11 U.S.C. § 547(c)(2) provides as follows:

> (c) The trustee may not avoid under this section a transfer –
>
> * * *
>
> (2) to the extent that such transfer was –
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

Section 547 is reprinted in its entirety at App. 35-40.

STATEMENT OF THE CASE

Unicom Computer Corporation ("Unicom") filed for bankruptcy under chapter 11 of the Bankruptcy Code[1] and thereafter sued IBM pursuant to § 547 to recover as voidable preferences 40 payments totalling approximately $731,000. Ruling that the payments came within the ordinary course of business exception to preference liability, the Bankruptcy Court found that "[t]he payments were as ordinary as this court has seen, and followed a pattern of dealing established well before the preference period." [App. 29]. Unicom appealed, and the District Court reversed as to 32 of the payments, ruling that IBM's evidence was "inadequate as a matter of law" [App. 19 n.6] to establish the exception as to such payments. IBM then appealed to the Court of Appeals, which affirmed. The Ninth Circuit compared the timing of the challenged transfers to IBM's published national collection policy, and held that while the 32 payments may have complied with local business practices, they did not satisfy the perceived national policy. [App. 7-8]. The Ninth Circuit afforded little or no weight to IBM's long-standing pattern of dealing with Unicom prior to the preference period.

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[1] Unless otherwise stated, all statutory references herein are to the United States Bankruptcy Code, which is Title 11 of the United States Code.

A. The Ordinary Course of Business Exception

The preference section of the Bankruptcy Code empowers a trustee to recover payments to unsecured creditors made within 90 days prior to bankruptcy. § 547(b). A transferee may avoid preference liability by availing itself of one or more of the exceptions or defenses enumerated in the subsections of § 547(c). At issue here is § 547(c)(2), known as the "ordinary course of business" exception. As this Court recognized in *Union Bank v. Wolas*, 502 U.S. 151, 112 S.Ct. 527, 116 L.Ed.2d 514:

> this exception was intended to "leave undisturbed normal financial relations, because it does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy."

502 U.S. at ___, 112 S.Ct. at 532, 116 L.Ed.2d at 523 (quoting H.R.Rep. No. 95-595, p. 373 (1977), U.S. Code Cong. & Admin. News 1978, p. 6329).

To establish its entitlement to the ordinary course of business exception, the creditor/transferee must satisfy each of the three elements of § 547(c)(2). First, it must prove that the debt was incurred in the ordinary course of business of both the debtor and the transferee. § 547(c)(2)(A). Second, the challenged transfer must have been made and received in the ordinary course of the parties' businesses. § 547(c)(2)(B). IBM's compliance with subsections (A) and (B) is not an issue here.

To satisfy the third element, the transferee must establish that the challenged transfer was "made according to ordinary business terms." § 547(c)(2)(C). The

interpretation of this short phrase has divided the Circuits, and IBM respectfully submits that it is important for this Court to resolve the conflict.

B. The Opinions Below

1. The Bankruptcy Court Decision.

The Bankruptcy Court had jurisdiction pursuant to 28 U.S.C. §§ 157(b)(2)(F) and 1334. In its Memorandum of Decision issued after a bench trial, the Bankruptcy Court held that IBM had satisfied the requirements of § 547(c)(2), and that none of the payments to IBM was avoidable. [App. 29-30]. The Bankruptcy Court found that:

(a) Unicom was in the business of purchasing computers and leasing them to end-users [App. 26];

(b) Unicom was contractually obligated to pay IBM when the computers that IBM sold to Unicom were installed [App. 28];

(c) Notwithstanding any contrary contract terms, IBM had a written policy allowing any leasing company purchaser to pay within 30 days after installation [App. 28];[2]

(d) Notwithstanding contrary contract terms and written policy, the IBM regional office always allowed purchasers to pay up until

---

[2] No evidence was introduced, however, to show that this written policy was followed by any IBM office or any of IBM's leasing company customers.

the last day of the month following the month of installation [App. 28];

(e) The IBM regional office allowed additional time after the end of the month following the month of installation if IBM had failed to promptly notify its purchaser that an installation had been completed [App. 28];

(f) During the 90 days before the bankruptcy, IBM treated Unicom no differently than it had prior to that time [App. 28, 29];

(g) IBM's actual payment terms were clear, known well by both parties, and were uniformly applied [App. 29]; and

(h) IBM treated Unicom no differently than it treated the other computer leasing companies to whom it sold computers. [App. 28, 29].

Although the Bankruptcy Court did not make an express finding with respect thereto, clear and uncontradicted evidence also showed that:

(i) Unicom's payment practices with respect to its other suppliers of computer equipment were exactly the same as its payment practices with respect to IBM;[3] and

(ii) The IBM regional office that dealt with Unicom serviced all of IBM's leasing company

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[3] Testimony of Unicom's former Director of Administration and Operations (Phillips) (ER at 121:23-25) ("ER" refers to Unicom's "Excerpt of Record: Trial Transcript" filed with the United States Court of Appeals for the Ninth Circuit.).

customers in Washington, Montana, Utah, Nevada, and Northern California.[4]

As noted above, the Bankruptcy Judge concluded that "[t]he payments were as ordinary as this court has seen, and followed a pattern of dealing established well before the preference period." [App. 29].

2. The District Court Opinion.

Unicom appealed, and the United States District Court for the Northern District of California, which had appellate jurisdiction pursuant to 28 U.S.C. § 158(a), affirmed in part and reversed in part. Without any discussion of whether or why the Bankruptcy Court's factual findings were clearly erroneous, the District Court concluded that only 8 of the 40 payments satisfied § 547(c)(2)(C), and that the other 32 were thus avoidable as preferential transfers. [App. 19-20].

The District Court held that § 547(c)(2)(C) requires proof that the payments in question were consistent with industry-wide practices. [App. 18-19]. It held that payment within IBM's national 30-day payment period from the date of installation or notice of installation (if different) was the appropriate standard. [App. 19-20]. Such conclusion was based in part on "inherent reasonableness," and in part on IBM's published national guidelines. With respect to IBM's uncontroverted evidence of longer payment periods permitted by the regional office,

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[4] Testimony of IBM Manager of Customer Operations (Santiago) (ER at 56:17-25).

the District Court concluded that IBM had, at most, established a local standard, and that such evidence was inadequate as a matter of law. [App. 19 n.6].

3. The Ninth Circuit Opinion.

IBM appealed to the United States Court of Appeals for the Ninth Circuit, which had appellate jurisdiction pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291. The Court of Appeals affirmed the District Court on the preference issue.[5] [App. 9]. Acknowledging that the phrase "ordinary business terms" in § 547(c)(2)(C) is not defined in the Bankruptcy Code, the Court adopted the test urged by Unicom (and applied by the District Court) that subsection (C) requires comparison of the terms of the challenged payments to an industry-wide set of uniform business terms. [App. 6-8].

Like the District Court, the Ninth Circuit did not discuss whether or why the Bankruptcy Court's findings of fact were clearly erroneous. Instead, it found that "IBM merely established that Unicom had a pattern of paying its invoices well after they were due. However, IBM introduced virtually no evidence of an industry-wide standard beyond the 30-day grace period it had already negotiated with the trade association." [App. 7]. In so concluding, the Ninth Circuit obviously gave little, if any, weight to the longstanding pre-bankruptcy course of dealings between IBM and Unicom. Also, the Circuit

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[5] The Court of Appeals reversed the District Court on a prejudgment interest issue. [App. 8-9]. That issue is not before this Court.

Court accorded no legal significance to the findings or the evidence that Unicom's payments in excess of 30 days were consistent with regional industry practices as shown by similar dealings between (i) Unicom and its vendors other than IBM, and (ii) IBM's regional office and its leasing company customers other than Unicom.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF AT LEAST SIX OTHER UNITED STATES COURTS OF APPEALS – WHICH DECISIONS ARE IN CONFLICT WITH ONE ANOTHER AS WELL

This case presents the Court with the opportunity to interpret the third element of the ordinary course of business exception, which requires that the challenged transfer be "made according to ordinary business terms." § 547(c)(2)(C). Within the last few years alone, that short phrase has been read in vastly different ways by no less than seven Circuit Courts. The Ninth Circuit's reading in this case conflicts with most, if not all, previous decisions. Two of the most recent Circuit Court cases expressly acknowledge that the Circuits are divided as to the meaning of § 547(c)(2)(C). *See, e.g., In re Molded Acoustical Products, Inc.*, 18 F.3d 217, 219 n.1 (CA3 1994); *In re Tolona Pizza Products Corporation*, 3 F.3d 1029, 1031 (CA7 1993). Even when the cases purport to adopt one another's reading of subsection (C), they often do so with a modification or a twist. For example, in *Molded Acoustical*, the Third Circuit first stated its agreement with the test set forth in *Tolona Pizza*, and then acknowledged that its

holding would "embellish" that test. 18 F.3d at 220. The net result of these disparate readings of subsection (C) is that cases with the same or similar relevant facts will be decided differently depending solely on the circuit in which the preference action is tried.

A. The Circuits Conflict Over Whether § 547(c)(2)(C) Establishes An Objective Standard

The majority of the Circuits, including the Ninth Circuit in this case, hold that subsection (C) creates an objective standard which can be satisfied only by independent evidence that establishes ordinary business terms within an industry. *See Tolona Pizza*, 3 F.3d at 1033; *In re Meridith Hoffman Partners*, 12 F.3d 1549, 1553 (CA10 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2677, 129 L.Ed.2d 812 (1994); *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d 680, 684 (CA8 1993); *In re Fred Hawes Organization, Inc.*, 957 F.2d 239, 244 (CA6 1992).

While § 547(c)(2)(C) does not refer to the debtor or the transferee, the Eleventh Circuit has nevertheless held that subsection (C) may be satisfied solely by evidence bearing on prior dealings between the parties. *In re Craig Oil Co.*, 785 F.2d 1563, 1566-68 (CA11 1986). In *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (CA4 1992), the Fourth Circuit appears to have adopted a similar subjective test (956 F.2d at 486), although later in the opinion the court looked beyond the dealings of the debtor and its transferee to similar transactions involving third parties. 956 F.2d at 488. The Third Circuit in *Molded Acoustical* expressly rejected the totally subjective view. 18 F.3d

at 223-24. However, the test it ultimately employed puts the Third Circuit far closer to the Fourth and Eleventh Circuits than to the Circuits holding that § 547(c)(2)(C) establishes an objective test.

B. The Circuits Disagree As To What The Objective Standard Requires

Among the Circuits that agree that subsection (C) creates an objective standard, there are widely divergent views on how that test can be satisfied. Two fundamental issues have arisen. The first is whether pre-bankruptcy dealings between the creditor/transferee and the debtor should be considered, and, if such evidence is considered, its importance. The second relates to defining the relevant industry.

1. Pre-Bankruptcy Dealings Between The Debtor And The Creditor/Transferee.

In determining that IBM had satisfied § 547(c)(2)(C), the bankruptcy judge made a finding of fact that IBM's treatment of Unicom during the 90 days prior to bankruptcy was no different than its treatment of Unicom during their longterm business relationship prior to the preference period. [App. 28, 29]. Neither the Ninth Circuit nor the District Court discussed the importance of IBM and Unicom's longstanding pre-filing relationship, leading to the conclusion that such facts were irrelevant to their determination that IBM had not satisfied subsection (C). This interpretation of the statute is consistent with the Sixth Circuit's decision in *Hawes*, 957 F.2d at

244-46, but is at odds with the approaches taken by all the other Circuits.

a. The *Tolona Pizza* Standard.

In *Tolona Pizza*, the Seventh Circuit acknowledged the significance of the parties' pre-insolvency credit relationship:

> [T]he most important thing is not that the dealings between the debtor and the allegedly favored creditor conform to some industry norm but that they conform to the norm established by the debtor and the creditor in the period before, preferably well before, the preference period.

3 F.3d at 1032. Despite the foregoing, the court concluded that subsection (C) would add nothing to subsections (A) and (B) if it could be satisfied solely by proof relating to pre-filing relationships. 3 F.3d at 1032. Thus, in the Seventh Circuit, the nature and extent of pre-filing dealings is important, but not determinative, and the trial court must look to:

> the *range* of terms that encompasses the practices in which firms similar in some general way to the creditor in question engage, and that only dealings so idiosyncratic as to fall outside that broad range should be deemed extraordinary and therefore outside the scope of subsection C.

3 F.3d at 1033 (emphasis in original).

b. Variations on the *Tolona Pizza* Standard.

The Eighth Circuit adopted but rephrased the *Tolona Pizza* test, looking to whether the repayment terms "were not so 'idiosyncratic' or 'extraordinary' as to fall outside the broad scope of subsection (c)(2)(C)." *U.S.A. Inns*, 9 F.3d at 685-86. The Eighth Circuit did not explain the significance, if any, of the addition of "extraordinary." In *Meridith Hoffman*, the Tenth Circuit cited *Tolona Pizza*, among other cases, for the proposition that

> [t]he preference section does not discourage "unusual action" simply because others in the industry wouldn't respond to similar circumstances in the same way. It discourages "unusual action" that may favor certain creditors or hasten bankruptcy by alarming other creditors and motivating them to force the debtor into bankruptcy to avoid being left out.

12 F.3d at 1553. The use of the phrase "unusual action" is attributable to the legislative history, which is also cited. The Fourth Circuit, in *Jeffrey Bigelow*, focused more on the term "ordinary" in subsection (C), concluding that because transfers similar to the one challenged in that case had been discussed in other cases, the transfer in question must have been ordinary. 956 F.2d at 488. The significance of the variations on the *Tolona Pizza* test by the Eighth, Tenth and Fourth Circuits is not enumerated in the cases. This uncertainty causes significant concern to companies like IBM that regularly extend credit.

c. The *Molded Acoustical* Standard.

The Third Circuit also rephrased the *Tolona Pizza* test, substituting the word "unusual" in place of the Seventh Circuit's reference to "idiosyncratic" dealings. The Third Circuit noted that its substitution enabled it "to stay true to what scarce legislative history there is." 18 F.3d at 224. *Molded Acoustical*, 18 F.3d at 224. But the conflict between *Molded Acoustical* on one hand, and *Tolona Pizza, U.S.A. Inns, Meridith Hoffman* and *Jeffrey Bigelow* on the other, is far deeper than a dispute over the use of the terms "ordinary," "unusual," "extraordinary" and "idiosyncratic." The Third Circuit admitted that it was embellishing on the Seventh Circuit's test, but that "embellishment" in fact established a new standard by relying far more heavily on pre-insolvency relationships than the Seventh Circuit did in *Tolona Pizza*. The Third Circuit stated:

> [W]e think that the duration of the parties' relationship is logically pertinent to the touchstone of the statutory policies undergirding § 547(C)(2), policies which we must always keep within our sights especially when trying to make sense out of such terse language as is found in § 547(c)(2). Furthermore, we are persuaded that resort to the length of the parties' relationship will remedy many of the defects otherwise apparent in that section.
>
> * * *
>
> [W]e adopt the following rule of construction as an aid to resolving these problems: the more cemented (as measured by its duration) the pre-insolvency relationship between the debtor and the creditor, the more the creditor will be

> allowed to vary its credit terms from the industry norm yet remain within the safe harbor of § 547(c)(2). The likelihood of unfair overreaching by a creditor (to the disadvantage of other creditors) is reduced if the parties sustained the same relationship for a substantial time frame prior to the debtor's insolvency. After all, if at the starting point of the relationship insolvency was a distant prospect, a trade creditor does not unfairly overreach, impel insolvency, or inequitably advantage itself at other creditors' expense by tolerating more generous or commanding more stringent repayment schedules than its competitors.

Molded Acoustical, 18 F.3d at 224-25. As the above-quoted language highlights, for longterm pre-insolvency relationships, *Molded Acoustical* comes almost full circle back to the subjective test employed by the Fourth and the Eleventh Circuits in *Jeffrey Bigelow Design* and *Craig Oil Co.*, respectively.

d. Summary.

In sum, the Eleventh Circuit applies a subjective test, looking only to the conduct of the parties prior to bankruptcy. The Fourth Circuit appears to look at a range of conduct, but with a heavy emphasis on pre-filing relationships. The Seventh, Eighth and Tenth Circuits apply an objective test that looks first to the conduct of the debtor and the creditor/transferee, paying special attention to their pre-insolvency relationship. They then determine whether such conduct is "unusual" or "idiosyncratic" or "extraordinary" with respect to the applicable industry. The Third Circuit purports to apply

such a test, but accords the pre-filing conduct substantial – if not determinative – weight. Only the Ninth Circuit and the Sixth Circuit afford pre-filing relationships no weight in determining whether business terms are ordinary for purposes of § 547(c)(2)(C).

2. Defining The Relevant Industry.

The second issue that divides the Circuits is whether ordinary business terms should be measured by a uniform, industry-wide standard or can be satisfied with reference to a regional business practice. In this case, the District Court ruled that an industry-wide standard is required, and that a local or regional standard cannot, as a matter of law, establish an industry-wide standard. The Ninth Circuit also required IBM to prove and adhere to an industry-wide standard. This interpretation of § 547(c)(2)(C) is contrary to the holding of the other Circuits that the transferee/creditor need not "establish the existence of some single, uniform set of business terms. . . . " *Tolona Pizza*, 3 F.3d at 1033. In rejecting the idea that the creditor must prove a uniform set of industry-wide credit terms, the Third Circuit acknowledged that "[s]ubsection C allows the creditor considerable latitude in defining what the relevant industry is." *Molded Acoustical*, 18 F.3d at 226. No Circuit Court other than the Ninth Circuit has adopted a requirement of conformity to a uniform set of industry-wide business terms. The Ninth Circuit's holding therefore directly conflicts with the recent decisions of the Third and Seventh Circuits. It also appears to conflict with the holdings of the Fourth, Sixth, Eighth, and Eleventh Circuits.

II.

THERE ARE IMPORTANT REASONS FOR THE COURT TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS AS TO THE MEANING AND SCOPE OF § 547(c)(2)(C)

A. The Court Should Ensure That The Preference Statute Achieves Its Intended Result Of Discouraging Creditors From Unnecessarily Forcing Borrowers Into Bankruptcy

It is important that the Court interpret subsection (C) to establish a reasonable, pragmatic test that can be relied upon by parties engaging in commercial transactions and can be applied uniformly. As noted throughout this Petition, the words of § 547(c)(2)(C) provide little guidance to its interpretation. Accordingly, virtually every published opinion in an ordinary course of business case quotes the meager legislative history (which is reprinted at page 4 of this Petition), and most proceed to further explain the purpose of preference law generally and the ordinary course of business exception in particular. In *Union Bank v. Wolas*, this Court noted that:

> the ordinary course of business exception may benefit all creditors by deterring the "race to the courthouse" and enabling the struggling debtor to continue operating its business.

502 U.S. at ___, 112 S.Ct. at 533, 116 L.Ed.2d at 524. *See also, Meridith Hoffman*, 12 F.3d at 1553; *Molded Acoustical*, 18 F.3d at 219; *Tolona Pizza*, 3 F.3d at 1032.

The Ninth Circuit has shackled creditors to a uniform industry-wide debt collection standard – which may not even exist. By not considering regional practices or prior

pre-insolvency transactions between the parties, the Ninth Circuit has created a significant obstacle to creditors working with their borrowers during those periods when bankruptcy is not looming. The inflexible Ninth Circuit approach penalizes vendors such as IBM who, throughout the course of their months or years of dealings with their customers, have established a consistent, though not nationally-applicable, debt collection pattern. It may compel trade creditors to cease shipments or to take premature enforcement actions solely because the customer is not making payments in conformity with a national guideline that ignores prior dealings between those parties and is contrary to regional trade customs.

B. The Ninth Circuit's Approach Is Inconsistent With Concepts Of Judicial Economy

The Ninth Circuit approach of tying ordinary business terms to a uniform industry-wide collection policy erroneously assumes that such a standard exists and that its existence can be proven. In *Molded Acccustical*, the Third Circuit noted that "identification of the industry whose standards should obtain would many times be problematic," and justified its heavy reliance on prior dealings between the parties on such potentially intractable proof problems. 18 F.3d at 224.

Such requirement of proof of an industry-wide standard raises substantial problems of judicial economy in that it would present

> a formidable if not insurmountable obstacle given the great variations in billing practices

> likely to exist within the set of markets or submarkets which one could plausibly argue comprise the relevant industry.

18 F.3d at 224. The Third Circuit added:

> We note, too, that the problems of proof can quickly become unmanageable where there are many firms in the industry, for evidence of the practices of a few firms might not satisfactorily establish the industry standards, especially if the debtor puts on contrary evidence (or so the creditor may reasonably anticipate, forcing it to prepare excessively for trial or causing it to settle unfavorably).

18 F.3d at 224.

The markets or submarkets about which Judge Becker wrote could be fixed in terms of geography (*i.e.*, local, statewide, regional, national) or by product type. Judge Posner, in *Tolona Pizza*, noted the difficult issues that would arise in the simple preference action by a local pizza-maker against its creditor, a sausage supplier:

> Not only is it difficult to identify the industry whose norm shall govern (is it, here, the sale of sausages to makers of pizza? The sale of sausages to anyone? The sale of anything to makers of pizza?), but there can be great variance in billing practices within an industry.

3 F.3d at 1033.

In requiring a transferee to establish a single controlling industry-wide standard as a matter of law, the Ninth Circuit has magnified the problems of proof identified by the Third and Seventh Circuits. The Ninth Circuit has

made preference litigation more time-consuming, expensive, and uncertain for not only the parties, but also the judicial system. This case presents this Court with the opportunity to interpret subsection (C) in such a manner as to avoid the Ninth Circuit's costly approach.

C. The Requirement of Uniform, Industry-Wide Terms Unnecessarily Hampers Business Between Solvent Entities

The ruling below raises new problems for businesses outside of the courtroom as well. As the Third Circuit stated, the more flexible interpretation of § 547(c)(2)(C) advanced by it and the Seventh Circuit gives meaning to subsection (C) without rendering the standard

> so exacting that a creditor is forced – both when soliciting new customers and when embroiled in a preference proceeding – to depend upon information about its competitor's trade practices, information that the competitors oft will be reluctant to yield and that frequently the creditor will find difficult to obtain. Indeed, the specter of antitrust liability, however remote, would often prove a resolute deterrent to such sharing of information between or among competitors (as well as conformity to one's competitors' practices even if such information were shared).

Molded Acoustical, 18 F.3d at 224. The Seventh Circuit was more succinct:

> The law should not push businessmen to agree upon a single set of billing practices; anti-trust objections to one side, the relevant business and financial considerations vary widely among

> firms on both the buying and the selling side of the market.

Tolona Pizza, 3 F.3d at 1033.

The above-quoted passages reflect that both the Third and Seventh Circuits have identified antitrust concerns relating to the application of a rigid, industry-wide standard. Such concerns are real. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980) (per curiam). In *Catalano*, certain beer wholesalers entered into an agreement among themselves to fix credit terms. This Court held that such a horizontal agreement was "merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any 'redeeming virtue,' it is conclusively presumed illegal. . . . " 446 U.S. at 650, 100 S.Ct. at 1929, 64 L.Ed.2d at 586.

In regulating normal credit relations between vendors and purchasers, the Ninth Circuit's interpretation of § 547(c)(2)(C) does much more harm than good. Although their approaches vary, the other Courts of Appeals have demonstrated that the aims of the preference statute can be implemented in a much less deleterious fashion. The Ninth Circuit's rigid approach is not compelled, or even supported, by the words or the spirit of the statute, and should be rejected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: August 30, 1994.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re UNICOM COMPUTER CORPORATION, a California corporation, a/k/a UNICOM COMMUNICATIONS CORPORATION, NHC CORP., and UNICOM CAPITAL CORPORATION. Debtor	No. 92-17070 D.C. No. CV-91-04377-WHO **MEMORANDUM*** (Filed Apr. 13, 1994)
UNICOM COMPUTER CORPORATION, as debtor-in-possession, Plaintiff-Appellee, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant-Appellant.	

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding

Argued and Submitted March 16, 1994
San Francisco, California

Before: CHOY, REINHARDT, and LEAVY, Circuit Judges.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

I. INTRODUCTION

This bankruptcy case involves a dispute over 40 payments totaling $730,791.56 made by the debtor, Unicom Computer Corporation ("Unicom"), to the creditor, International Business Machines Corporation ("IBM"), during the 90-day period immediately preceding the filing of Unicom's petition for bankruptcy under Chapter 11 of the Bankruptcy Code.

IBM appeals the judgment of the district court, which held that 32 of the 40 payments were not made according to "ordinary business terms" under 11 U.S.C. § 547(c)(2)(C) and were therefore avoidable. IBM also appeals the district court's calculation of the prejudgment interest award. We affirm on the "ordinary business terms" issue, we reverse on the prejudgment interest issue, and we remand to the district court for a recalculation of interest.

II. BACKGROUND

Debtor Unicom Computer Corporation ("Unicom") was in the business of leasing, servicing, and supplying computers. About 90 percent of the products it handled was provided and installed by creditor International Business Machines Corporation ("IBM").

During the 90-day period immediately preceding the filing of Unicom's petition for bankruptcy, Unicom made 40 payments totaling $730,791.56 to IBM. The payments were made pursuant to 40 invoices that IBM had sent to Unicom primarily for the installation of equipment on the premises of Unicom's clients, but also for other services.

The 40 payments were made as follows: (i) none were made in accordance with the literal terms of IBM's national purchase contracts, which required *payment upon installation;* (ii) five were made in accordance with IBM's national grace period policy, which allowed payment *30 days after installation;*[1] (iii) three were made within *30 days after notice of installation* was given to Unicom;[2] (iv) 32 were made more than 30 days after installation or notice of installation.[3]

III. PRIOR PROCEEDINGS

On September 12, 1988, Unicom filed a bankruptcy petition under Chapter 11 of the Bankruptcy Code. On September 11, 1990, Unicom filed an adversary proceeding against IBM in Bankruptcy Court to recover the 40 payments totaling $730,791.56 that it had made to IBM during the 90-day period immediately preceding its bankruptcy petition.

The bankruptcy court concluded that all 40 transfers satisfied the requirements of § 547(c)(2) and therefore were not avoidable as preferential transfers. It reasoned that "[t]he payments were as ordinary as this court has seen, and followed a pattern of dealing established well before the preference period." *Id.* Unicom appealed, claiming that the ordinary "pattern of dealing" between

---

[1] Transfers 1, 2, 12, 13, and 14.

[2] Transfers 15, 18, and 40.

[3] Transfers 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39.

the parties was insufficient to satisfy the "ordinary business terms" requirement of 11 U.S.C. § 547(c)(2)(C).

The district court reversed the bankruptcy court's decision with respect to 32 of the 40 transfers. It found that the "ordinary business terms" requirement of 11 U.S.C. § 547(c)(2)(C) required the transfers to conform with an objective industry-wide practice standard. Finding that industry practice was payment within 30 days of installation or notice of installation, the district court held that only eight of the 40 transfers were made under "ordinary business terms" and thus were not avoidable.

The district court entered a judgment in favor of Unicom in the amount of $668,498.44. The court also awarded Unicom costs of $5,283.85 and prejudgment interest of $132,906.69. The court based its prejudgment interest rate on the date that the prejudgment interest first started to accrue. The district court denied IBM's motion to alter or amend the judgment with respect the prejudgment interest award. *Id.*

IV. DISCUSSION

A. "Ordinary Business Terms"

1. Statutory Background. Section 547(b) of the Bankruptcy Code, 11 U.S.C. § 547(b), authorizes a trustee to avoid certain property transfers made by a debtor within

90 days before bankruptcy.[4] The purpose of that section is to "prevent favoritism among the debtor's creditors who ought in fairness to stand on the same footing." *See* Lawrence P. King et al., 4 *Collier on Bankruptcy* § 547.10, at 547-36 (15th ed. 1993).

The Bankruptcy Code makes an exception to this rule for any transfer that is made in the ordinary course of business, 11 U.S.C. § 547(c)(2). This exception provides:

> (c) The trustee may not avoid under this section a transfer –
>
> . . . .
>
> (2) to the extent that such transfer was –
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or the financial affairs of the debtor and transferee;
>
> (B) made in the ordinary course of business or financial affairs of debtor and transferee; and
>
> (C) made according to *ordinary business terms.*

Id. (emphasis added).

---

[4] Section 547(b) provides:

> (b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –
>
> . . .
>
> (4) made –
>
> (A) on or within 90 days before the filing of the petition; . . . .

Id.

2. Analysis. The only question before us is whether IBM's previous "pattern of dealing" with Unicom is sufficient to satisfy the "ordinary business terms" requirement of 11 U.S.C. § 547(c)(2)(C) ("Section 547(c)(2)(C)").[5] IBM argues that such evidence is sufficient. Unicom disagrees; it argues that Section 547(c)(2)(C) requires evidence that the transfers at issue conform to an objective industry-wide standard.

We agree with Unicom. The phrase "ordinary business terms" is not defined by the Bankruptcy Code. However, this circuit has determined that Section 547(c)(2)(c) [sic] requires that the transfers at issue be "ordinary in relation to prevailing business standards." *See In re Food Catering & Housing, Inc.*, 971 F.2d 396, 398 (9th Cir. 1992).[6] In so doing, we adopted the view of the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), which had held that Section 547(c)(2)(C) "requires proof that the challenged transfer was made pursuant to an *objective standard* based on practices common to businesses similarly situated to the debtor and transferee." *See In re Loretto Winery, Ltd.*, 107 B.R. 707, 709 (9th Cir. BAP 1989) (emphasis added).

---

[5] The parties agree that the requirements of § 547(c)(2)(A) and (B) have been satisfied.

[6] According to the *Food Catering* court:

> To qualify for the "ordinary course" exception, a creditor must prove that: 1) the debt and its payment are ordinary in relation to past practices between the debtor and this particular creditor; *and* 2) the payment was ordinary in relation to prevailing business standards.

Id. (emphasis in original).

Here, the district court found that the relevant industry standard was payment within 30 days of installation or 30 days of notification of installation. This finding was based upon IBM's national grace-period policy, which was established through an agreement with an *industry-wide* trade association of equipment lessors. (The lessors sought the 30-day grace period because it would allow them time to obtain sufficient financing.) Accordingly, the district court held that the eight transfers satisfying this criteria were not avoidable.[7]

As to the other 32 payments, IBM failed to show by a preponderance of the evidence that those payments were made in accordance with "ordinary business terms." *See* 11 U.S.C. § 547(g) (holding that the burden of proof is on the creditor); *In re Food Catering & Housing, Inc.*, 971 F.2d at 398 (same). At trial, IBM merely established that Unicom had a pattern of paying its invoices well after they were due.[8] However, IBM introduced virtually no evidence of an industry-wide standard beyond the 30-day grace period it had already negotiated with the trade association.[9] At best, it showed that its local branch had

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[7] Unicom has not cross-appealed from this holding.

[8] For example, IBM's local branch payment policy allowed payment to be made at any time before the last day of the month in which the national grace-period expired. Thus, if the national grace-period expired on March 15th, the customer had until March 31st to make payment.

[9] IBM points to statements made by four witnesses: Unicom executive Richard Hynes, IBM employee Sandra Lee Santiago, IBM employee Karen Carney Wagner, and former Unicom employee Karen H. Phillips. However, none of these employees actually testified to an industry-wide payment standard. In fact,

"occasionally" dealt with other clients in a similar fashion. Accordingly, we affirm this portion of the judgment of the district court.

B. Prejudgment Interest

On appeal, IBM does not dispute that Unicom is entitled to prejudgment interest.[10] IBM disputes only the district court's determination of the *rate* at which the interest is calculated.

The district court held that the prejudgment interest rate is determined with reference to the 52-week T-Bill auction rate "on the date that prejudment [sic] interest begins to accrue." The T-Bill rate on the date that prejudgment interest began to accrue – June 6, 1990 – was 8.7%. *See* Declaration of Constance L. Kleiner in Support of Ex Parte Application for Entry of Judgment (July 23, 1992). Under that rate, IBM would have been liable for $132,906.69 in prejudgment interest.

By contrast, IBM argues that the interest rate should have been determined based on the 52-week T-Bill auction rate *immediately prior to judgment*. The T-Bill rate immediately prior to the date of judgment – September 10, 1992 – was only 3.41%. *See* Declaration of Cheryl A. Stevens in Support of IBM's Motion to Amend or Alter

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IBM voluntarily abandoned its line of questioning on this issue after Unicom objected that IBM had failed to lay a sufficient foundation for its questions.

[10] We have held that prejudgment interest may be awarded for preferential transfers under the Bankruptcy Code. *See, e.g., In re Nucorp Energy, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990).

the Judgment (Sept. 18, 1992). Under that rate, IBM would have been liable for only $53,501.25 in prejudgment interest.

We have previously held that in the bankruptcy context the prejudgment interest rate is governed by the 52-Week T-Bill auction rate *"immediately prior to the date of judgment." In re Nucorp Energy, Inc.*, 902 F.2d at 734 (emphasis added); *see also* 28 U.S.C. § 1961(a) (providing that the rate of interest is "the average accepted auction price for the last auction of fifty-two week United States Treasury bills *settled immediately prior to the date of the judgment*" (emphasis added)). Accordingly, we reverse the judgment of the district court on the prejudgment interest issue.[11]

V. CONCLUSION

In sum, we affirm the district court's holding with respect to the "ordinary business terms" issue. However, we reverse its holding with respect to the prejudgment interest issue and remand for a proper recalculation of interest. The parties shall bear their own costs on this appeal.

---

[11] Our precedent allows a deviation from this rate if the equities of a particular case demand a different rate. However, "[t]his circuit has a strong policy in favor of the Treasury bill rate, . . . [and] any departure from it must be accompanied by a reasoned justification." *Blanton v. Anzalone*, 813 F.2d 1574, 1576 (9th Cir. 1987). Neither the District Court nor Unicom has advanced any reasons why the rate of interest should deviate from the 52-week T-Bill rate immediately prior to judgment.

AFFIRMED in part, REVERSED in part, and REMANDED.

DO NOT PUBLISH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re: UNICOM COMPUTER CORPORATION, a California corporation, aka UNICOM COMMUNICATIONS CORPORATION, NCH CORP. and UNICOM CAPITAL CORPORATION, Debtor.	No. C-91-4377 WHO MEMORANDUM OPINION (Filed July 17, 1992)
UNICOM COMPUTER CORPORATION, as debtor-in-possession, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant.	

This is an appeal[1] by Unicom Computer Corporation ("Unicom") from a judgment by the United States Bankruptcy Court for the Northern District of California in

[1] Unicom appealed to the Bankruptcy Appellate Panel but International Business Machines Corporation objected to the appeal being heard by the Bankruptcy Appellate Panel and the appeal was thereafter transferred to this Court.

favor of a creditor, International Business Machines Corporation ("IBM"). The central question is whether certain payments made by Unicom to IBM during the ninety-day period immediately preceding the filing of the bankruptcy petition were made in the ordinary course of business and according to ordinary business terms as required by 11 U.S.C. § 547(c)(2)(A)(B)(C).[2]

For the reasons set forth below, this Court holds that some of the payments were made in the ordinary course of business and according to ordinary business terms and some were not. Accordingly, the judgment of the Bankruptcy Court is affirmed in part and reversed in part.

I.

Unicom, engaged in the business of leasing computers, purchased the bulk of these computers from IBM. Funding for these purchases came from limited partnerships organized by Unicom with a third party, Leasetec, Inc., which also served as general partner.

On September 12, 1988, Unicom filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. 11 U.S.C. § 1101 *et seq.*[3] On September 11, 1990, Unicom filed suit against IBM to recover forty

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[2] IBM raises two additional issues for appeal, namely, whether the Bankruptcy Court properly disposed of IBM's "new value" affirmative defense and its "contemporaneous transfer" affirmative defense. Yet, IBM did not file a notice of appeal, nor did IBM cross-appeal on these issues. Therefore, it is not proper for this Court to hear argument on those issues.

[3] Title 11 of the United States Code shall be referred to generally as the "Bankrputcy Code."

different payments (hereinafter called "transfers") made by it to IBM for certain of the computers and computer equipment it had purchased. As noted above, the forty transfers[4] were all made during the ninety-day period immediately preceding the filing of Unicom's bankruptcy petition. Unicom remains in possession of its assets because no trustee has been appointed.

Under the terms of the purchase contracts for the equipment, payment was due upon installation of the equipment for those pieces of equipment requiring installation. Of the forty transfers at issue, none were paid when the equipment was installed. Pl.'s Ex. 41. Twelve purchases not requiring installation were paid an average of 126 days after the date of invoice. Under a national policy adopted by IBM for dealings with equipment lessors, and notwithstanding the terms of the contract, leasing-company purchasers were also allowed a grace period of thirty days after installation to make payment. Def.'s Ex. 42. Of the forty transfers at issue, five were made within the thirty-day grace period (transfers 1, 2, 12, 13, and 14). Pl.'s Ex. 41.

IBM created four regional Central Response Offices for dealing with computer equipment leasing companies. The regional office involved in this case, Branch Office 27-C in Palo Alto, California, adopted its own policy allowing payment for equipment to be made by the last day of the month in which the thirty-day grace period authorized by the national policy expired. Of the forty

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[4] The transfers at issue are referred to throughout this Memorandum Opinion according to the designations in Unicom's Exhibit 41.

transfers at issue, nine were made in accordance with Branch Office 27-C's local policy allowing payment on the last day of the month in which the thirty-day grace period expired (transfers 3, 4, 10, 15, 23, 24, 25, 27, and 40). Pl.'s Ex. 41. The remaining transfers concerned equipment that did not require installation (transfers 8, 9, 11, 17, 21, 30, 31, 32, 33, 35, 36, and 39), or were late even under the more generous terms of the local policy (transfers 5, 6, 7, 16, 18, 19, 20, 22, 28, 29, 34, 37, and 38). *Id.*

The majority of the transfers were for equipment that was installed upon the premises of third-party lessees. IBM informed Unicom of the installation by sending an Installation Advice Form ("IAF"). Where IBM inadvertently delayed sending the IAF to Unicom, the date upon which the thirty-day period began would be tolled until the IAF was sent. This occurred in connection with transfers 5, 6, 7, 15, 18, and 40. Of these transfers, 5, 6, and 7 were paid thirty-nine days after the date of the IAF. Transfers 15, 18, and 40 were paid within thirty days after the date of the IAF.

II.

A.

The Bankruptcy Court's findings of fact are reviewed under the clearly erroneous standard, and conclusions of law are reviewed *de novo*. *In re California Trade Technical Schools, Inc.*, 923 F.2d 641, 645 (9th Cir. 1991).

B.

The pertinent law is 11 U.S.C. § 547(c). This section of the Bankruptcy Code provides as follows:

> (c) The trustee may not avoid under this section a transfer – . . .
>
> (2) to the extent that such transfer was –
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> (D) made according to ordinary business terms.

11 U.S.C. § 547(c)(2)(A)(B)(C). The evident purpose of this code section is to provide an affirmative defense to the general rule that debtors may recover payments made to creditors within the ninety-day period preceding bankruptcy. *In re Loretto Winery, Ltd.*, 107 B.R. 707, 708 (9th Cir. BAP 1989). IBM has the burden of proving that the transfers met all three requirements of subsections (A), (B), and (C) of § 547(c)(2). 11 U.S.C. § 547(g). The parties stipulated that element (A) was met. Unicom, however, argues that the bankruptcy court erroneously found that IBM had met elements (B) and (C) above.

Subsections (B) and (C) of § 547(c)(2) establish two separate tiers of the "ordinary course of business" defense. Under subsection (B) the transfers must have been in the "ordinary course of business or financial

affairs of the debtor and the transferee." Under subsection (C), the transfers must have been made "according to ordinary business terms." The Court deals with these subsections *seriatim*.

1.

Regarding subsection (B) of § 547(c)(2), Unicom argues that the erratic payments during the preference period indicate that these payments were not made in accordance with the ordinary course of business between Unicom and IBM because the transfers did not comport with IBM's national or local policy. To establish that an ordinary course of business exists between the parties regarding late payments under §547(c)(2)(B), "the lateness of the periodic payments must be the norm as opposed to the exception." *In re Federated Marketing, Inc.*, 123 B.R. 265, at 266 (Bankr. S.D. Ohio 1991). Here, the transfers were in the ordinary course of business between Unicom and IBM because the Bankruptcy Court found that "IBM treated the debtor no differently during the 90 days before bankruptcy than it had prior to that time," and that the payments "followed a pattern of dealing established well before the preference period." Memorandum of Decision, filed Sept. 24, 1991, at 3, 4.

2.

Regarding subsection (C) of § 547(c)(2), a primary question raised by this statutory language is the standard by which one determines "ordinary business terms." As in this case, the *Loretto* court was asked to determine whether § 547(c)(2)(C) "embodied an objective standard

to be shown by the custom in the industry in which the transferee and debtor are engaged." The *Loretto* court noted that subsections (A) and (B) covered the subjective dealings between the parties because of the clear language specifying the conduct "between the debtor and the transferee." 107 B.R. at 709. Subsection (C) does not share that language. Therefore, that court concluded that subsection (C) "requires proof that the challenged transfer was made pursuant to an objective standard based on practices common to businesses similarly situated to the debtor and transferee." *Id.* Because the transferee in that case had presented "no objective evidence at all," the court affirmed the lower court's decision to avoid the transfers as preferences. *Id.* at 710. Unicom relies on *Loretto* in asserting that because IBM failed to provide any evidence establishing an industry practice, it failed to meet its burden to establish this affirmative defense.

IBM argues that the *Loretto* court implied that a clear history of prior dealings between the debtor and the transferee could meet this objective standard. This reading misconstrues *Loretto*. Where a record of prior conduct yields ascertainable boundaries, that history may easily be compared with practices common to "business similarly situated to the debtor and the transferee." *Id.* at 709. Yet, evidence of practices common to businesses similarly situated to the debtor and the transferee must still be presented to make this comparison. A majority of other courts have defined "ordinary business terms" according to practices common in the relevant industry. In *In re SPW Corp.*, 96 B.R. 676 (Bankr. N.D. Tex. 1989), the bankruptcy court engaged in an extended analysis of the relationship between subparagraphs (B) and (C) of

§ 547(c)(2). That court determined that § 547(c)(2)(C) requires proof of an objective standard. *Id.* at 680. In that case, the burden was met when an expert with extensive professional experience in the industry testified that the payments at issue were in accordance with industry standards. *See also, Matter of Century Brass Products, Inc.*, 121 B.R. 136, 139 (Bankr. D. Conn. 1990) (a "majority of jurisdictions now agree that 'ordinary business terms' in subdivision (C) refers to 'an objective standard to be shown by the custom in the industry. . . . ' ") (quoting *Loretto*, 107 B.R. at 709-10). This Court follows the majority of circuits and the compelling logic of the statute and requires an objective showing from IBM that the chronically late payments were made according to ordinary business terms in the computer leasing industry.

There was no evidence before the lower court concerning industry standards for payment in the computer leasing industry. On two occasions at trial, IBM attempted to elicit "expert" testimony on this topic. On the first occasion, Unicom's counsel objected for lack of foundation; the court sustained the objection and the line of questioning was abandoned. R.T. at 113-14. On the second occasion, Ms. Karen Phillips, a former employee of Unicom, explained that within her "limited" experience, "[t]he few times [Unicom] purchased equipment from vendors other than IBM, we followed the same [purchase] procedures." R.T. at 121:23-25. Additionally, there was some evidence indicating that other equipment lessors like Unicom were treated similarly by IBM's Branch Office 27-C in terms of the local payment policy.

At most, this evidence establishes a local standard for computer lessors dealing with IBM and obviously is not

evidence of an industry-wide standard of ordinary business terms. Given the inherent reasonableness of a thirty-day grace period for transactions of this nature, and the fact that the thirty-day grace period was a national policy of IBM, the Court finds that transfers made within that period were made according to ordinary business terms.[5] Those payments made outside the thirty-day grace period do not appear to comport with ordinary business terms of any industry. IBM has not met the burden required by § 547(c)(2)(C) to prove by an objective standard that any transfers made outside of the thirty-day grace period were made according to "ordinary business terms" of the computer leasing industry.[6]

Upon analysis of the repayment record, the Court determines that transfers made within the thirty-day national grace period comported with "ordinary business terms" within the meaning of subsection (C). All other transfers at issue were not within "ordinary business terms" and must be avoided as preferences, including

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[5] The Court includes among this number those transfers paid within thirty days of the date of the IAF sent by IBM to Unicom.

[6] At oral argument, IBM alluded to several sections of the reporter's transcript of the trial to demonstrate evidence in the record of an objective standard. *See*, R.T. at 64:1-65:13, 87:10-88:16, 97:23-98:24. All of these excerpts, however, refer to practices of the Branch Office C-27. At best, this demonstrates a practice common to one-fourth of IBM's computer leasing sales. None of these excerpts provide evidence concerning standards of IBM's other offices or the purchasers from those offices or concerning other computer manufacturers' sales to computer leasing companies. The showing is inadequate as a matter of law.

those payments for materials which did not require installation (paid a minimum of ninety-seven days after the invoice date.) The Court determines that the following transfers were preferences that must be avoided: 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, and 39.

Affirmed in part and reversed in part.

Dated: July 15, 1992.

/s/ William H. Orrick
William H. Orrick
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re: UNICOM COMPUTER CORPORATION, a California corporation, aka UNICOM COMMUNICATIONS CORPORATION, NCH CORP. and UNICOM CAPITAL CORPORATION, Debtor.	No. 1-88-01593 Chapter 11
UNICOM COMPUTER CORPORATION, as debtor-in-possession, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant.	Civil No. C-91-4377 WHO ENTERED IN CIVIL DOCKET SEP 10, 1992 JUDGMENT (Filed Sep 4, 1992)

This appeal was heard before the above-entitled Court, the Honorable William H. Orrick, United States

District Judge, presiding, on March 12, 1992. Unicom Computer Corporation, the debtor-in-possession and plaintiff-appellant herein, appeared through its counsel Constance L. Kleiner of Goldberg, Stinnett & Macdonald, A Professional Corporation, and defendant-appellee International Business Machines Corporation appeared through its counsel Gary T. Lafayette of McGee, Lafayette, Willis & Greene.

This Court having considered the application filed concurrently herewith, the record on appeal, counsel's briefs, and arguments at the appeal hearing, and having entered the memorandum opinion filed on July 17, 1992, which shall constitute the findings of fact and conclusions of law, and for good cause shown,

NOW THEREFORE, IT IS HEREBY ORDERED, DECREED AND ADJUDGED that:

1. The judgment of the United States Bankruptcy Court for the Northern District of California in favor of International Business Machines Corporation is hereby affirmed in part and reversed in part, as set forth herein-below.

2. Unicom Computer Corporation is hereby awarded judgment against International Business Machines, a New York corporation and the defendant herein, in the sum of $801,405.24, together with costs as

allowed under the applicable local rules, bankruptcy rules and statutes.

DATED: July ____, 1992

Sep. 3, 1992

/s/ William H. Orrick
THE HONORABLE
William H. Orrick
United States
District Judge

DO NOT PUBLISH

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNICOM COMPUTER CORPORATION, Plaintiff, vs. INTERNATIONAL BUSINESS MACHINES CORPORATION, Defendant.	)	No. C-91-4377 WHO ORDER (Filed Dec. 3, 1992)

Defendant's motion to amend the Judgment filed on September 4, 1992, having come before the Court, the Court having considered the pleadings, and having had the benefit of oral argument,

IT IS HEREBY ORDERED that the motion to amend the Judgment is DENIED. The prejudgment interest was properly calculated. Prejudgment interest is calculated using the market rate, defined as the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States treasury bills. *In re Nucorp Energy, Inc.*, 904 F.2d 729, 734 (9th Cir. 1990); *In re Bloom*, 875 F.2d 224, 228 (9th Cir. 1989). The market interest rate is determined on the date that prejudgment interest begins to accrue. *Columbia Brick Works, Inc. v.*

Royal Ins. Co., 768 F.2d 1066, 1071 (9th Cir. 1985); *Blanton v. Anzalone*, 760 F.2d 989, 993 (9th Cir. 1985).

Dated: November 30, 1992.

/s/ William H. Orrick
William H. Orrick
United States
District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re

UNICOM COMPUTER CORP., No. 1-88-01593

Debtor.
_____/

UNICOM COMPUTER CORP.,

Plaintiff, A.P. No. 1-90-0204

v.

INTERNATIONAL BUSINESS MACHINES CORP.,

Defendant.
_____/

Memorandum of Decision

(Filed Sept. 24, 1991)

This is a preference action brought by the debtor in possession pursuant to section 547 of the Bankruptcy Code. The debtor alleges that approximately $731,000.00 paid to defendant International Business Machines Corporation during the 90-day period before bankruptcy should be returned to the estate.

Prior to bankruptcy, the debtor was in the business of purchasing computers and leasing them to users. Most of the computers it purchased were from IBM. The debtor would finance the purchase with loans from Leasetech,

Inc. The funds from Leasetech were intended to fund specific computer purchases, but were paid to the debtor without restriction and deposited into the debtor's general account.

IBM raises three defenses to the action. First, it argues that all payments were in the ordinary course of the debtor's business. Second, it argues that there were substantially contemporaneous exchanges for new value. Third, it argues that the "earmarking" doctrine is applicable.

The "earmarking" doctrine does not appear in the text of the Bankruptcy Code. It is a court-made rule which states that there is no recoverable preference where a third party loans funds to the debtor with instructions to use the funds to pay off another creditor.

The court has serious doubt that such a doctrine exists at all in this circuit. The Ninth Circuit case cited by IBM, *In re Sierra Steel, Inc.*, 96 B.R. 271 (9th Cir. BAP 1989), does not hold that the doctrine exists, but only that it was not applicable to the facts before it. While their may be some justification for applying the doctrine where the lender disburses loan funds directly to the old creditor, once the funds have been given to the debtor and deposited into its general account any such justification disappears. At that point, the debtor clearly obtained an interest in the funds significant enough to make their transfer subject to avoidance. Any other ruling would elevate court-made law over the clear meaning of a statute. Since the funds in question were deposited into the debtor's general account and could have been used by the debtor for any purpose with no more penalty than a

breach of contract claim by the lender, the court finds the earmarking document inapplicable.

It is clear that under the contract the payments were intended to be contemporaneous with installation. However, IBM's policies did not conform to the contract and the payments were not in fact substantially contemporaneous. Accordingly, the defense set forth in section 547(c)(1) of the Code is not applicable.

The sole real issue in this case is whether the payments made to IBM were in the ordinary course of the debtor's business. The evidence was absolutely clear and uncontradicted that the debtor was contractually obligated to pay IBM when the computers were installed; that IBM had a written policy allowing purchasers 30 days after installation to pay, notwithstanding the contract; that the local office handling the debtor's account always allowed purchasers up until the last day of the month following the month of installation to pay, notwithstanding the contract and the written policy; and that even longer times were allowed if IBM failed to promptly notify the purchaser that an installation had been completed. IBM treated the debtor no differently during the 90 days before bankruptcy than it had prior to that time. IBM treated the debtor no differently than any other computer leasing company to whom it sold computers.

The case law most damaging to IBM is *In re Powerline Oil Co.*, 126 B.R. 790 (9th Cir. BAP 1991). In that case, the contract called for payment by a certain date but the defendant argued that it had a standard policy allowing later payment. The court's decision is unclear; at one

point (126 B.R. at 795), it states that "[defendant's] evidence that its standard practice was to begin the 30 day payment period upon the approval of the invoice should not be used to contradict the clear contract terms." At another point on the same page, it states that "failure to make payments within the time required by the contract creates a rebuttable presumption that the payment is non-ordinary, *id.*, late payments can be within the ordinary course of business if they are a few days late and follow the prior practice of the parties."

The court believes that this latter statement of the law is the rule intended by the appellate panel. To the extent it is not, the court distinguishes *Powerline Oil* on grounds that in that case there was no evidence that the late payments followed prior practice of the parties and that the debtor in that case had held the checks for three weeks, due to its precarious financial condition, before sending them to the defendant.

The court finds that IBM has rebutted the presumption that the payments were non-ordinary because they were made outside contract terms. The actual terms enforced by IBM were clear, known well by both parties, and uniformly applied. The debtor was treated no differently from other like companies, and its treatment did not change during the 90 days prior to bankruptcy. The payments were as ordinary as this court has seen, and followed a pattern of dealing established well before the preference period. Only if the presumption discussed in *Powerline Oil* were unrebuttable would the debtor be entitled to judgment.

For the foregoing reasons, the debtor shall take nothing by its complaint which shall be dismissed, with prejudice. IBM shall recover its costs of suit.

This memorandum constitutes the court's findings and conclusions. Counsel for IBM shall forthwith submit an appropriate form of judgment.

Dated: September 24, 1991

/s/ Alan Jaroslovsky
Alan Jaroslovsky
U.S. Bankruptcy Judge

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy Court for the Northern District of California hereby certifies that a copy of the attached document was mailed to all parties listed below as required by the Bankruptcy Code and Rules of Bankruptcy Procedure.

Dated: September 24, 1991

/s/ Deputy Clerk

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
(DIVISION ONE)

In re: UNICOM COMPUTER CORPORATION, a California corporation, aka UNICOM COMMUNICATIONS CORPORATION, NCH CORP. and UNICOM CAPITAL CORPORATION, Debtor.	No. 1-88-01593 Chapter 11
UNICOM COMPUTER CORPORATION, as debtor-in-possession, Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant.	Adversary Proceeding No. 1-90-0204 JUDGMENT (Filed Oct. 2, 1991)

Upon the trial of the above-captioned adversary proceeding, which came before the Honorable Alan Jaroslovsky, United States Bankruptcy Judge, on September 24, 1991, in the United States Bankruptcy Court, 1450 Guerneville Road, Building G, Santa Rosa, California. Plaintiff, Unicom Computer Corporation, appeared by counsel Dennis D. Davis, Esq. and Constance L. Kleiner, Esq. of Goldberg Stinnett & MacDonald; defendant, International Business Machines ("IBM"), appeared by counsel Gary T. Lafayette, Esq. and Cheryl A. Stevens, Esq. of Alexander, Millner & McGee.

On proof made to the satisfaction of the Court based upon the evidence and pleadings submitted, and good cause appearing therefor,

IT IS ADJUDGED, ORDERED AND DECREED;

1. That the plaintiff take nothing by its complaint;

2. ~~That judgment be entered in favor of defendant IBM and against plaintiff Unicom Computer Corporation;~~

3. That the complaint herein be dismissed, with prejudiced and;

4. That defendant IBM recover its costs of suit.

Dated: October 2, 1991.

/s/ Alan Jaroslovsky
THE HONORABLE
ALAN JAROSLOVSKY
United States Bankruptcy Judge

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: UNICOM COMPUTER CORPORATION, a California corporation, a/k/a UNICOM COMMUNICATIONS CORPORATION, NHC CORP. and UNICOM CAPITAL CORPORATION,	No. 92-17070
	D.C. No. CV-91 04377-WHO
	ORDER
	(Filed June 2, 1994)
UNICOM COMPUTER CORPORATION, as debtor-in-possession, Plaintiff-Appellee, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, a New York corporation, Defendant-Appellant.	

Before: CHOY, REINHARDT, and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judges Reinhardt and Leavy have voted to reject the suggestion for rehearing en banc and Judge Choy so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petiton for rehearing is denied and the suggestion for rehearing en banc is rejected.

11 U.S.C. § 547. Preferences

(a) In this section –

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if –

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made, and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer –

(1) to the extent that such transfer was –

(A) intended by the debtor and the creditor to or for whose benefit such tranfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor –

(A) to the extent such security interest secures new value that was –

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor –

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such tranfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of –

(A)(i) with respect to a transfer to which subsection (b)(4)(A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b)(4)(B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such tranfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e)(1) For the purposes of this section –

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be

perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made –

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidabilty of a transfer under

subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.

Supreme Court, U.S.
F I L E D
SEP 27 1994
OFFICE OF THE CLERK

No. 94-391

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

CHARLES E. SIMS, CHAPTER 11 TRUSTEE OF THE BANKRUPTCY ESTATE OF UNICOM COMPUTER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a bankruptcy action to avoid a preferential transfer, can the transferee satisfy 11 U.S.C. § 547(c)(2)(C), the ordinary business terms element of the ordinary course of business exception, by establishing only the terms of the pre-insolvency dealings between the transferor and transferee, without establishing that the transfer was made according to ordinary business terms by any objective standard?

LIST OF PARTIES

Charles E. Sims, as Trustee and the Respondent herein, does not disagree with the List Of Parties set forth in the Petition For A Writ Of Certiorari submitted by the Petitioner.

RULE 29.1 LISTING

Unicom Computer Corporation, the appellee below, is a California corporation, and has no parent companies, subsidiaries or affiliates. The Respondent before this Court is an individual acting as a trustee, and is not a corporation.

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No. 94-391

In The

Supreme Court of the United States

October Term, 1994

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

CHARLES E. SIMS, CHAPTER 11 TRUSTEE OF THE BANKRUPTCY ESTATE OF UNICOM COMPUTER CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Charles E. Sims, as chapter 11 trustee of the bankruptcy estate of Unicom Computer Corporation ("Respondent"), the Respondent herein, respectfully requests that the petition of International Business Machines Corporation ("IBM" or "Petitioner") for a writ of certiorari in this case be denied.

JURISDICTION

The Respondent agrees with the jurisdictional statement set forth in the petition submitted on behalf of Petitioner.

STATUTORY PROVISION INVOLVED

11 U.S.C. § 547(c)(2) provides as follows:

(c) The trustee may not avoid under this section a transfer –

* * *

(2) to the extent that such transfer was –

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

STATEMENT OF THE CASE

A. Preferences and Ordinary Course Defense

Section 547 of the United States Bankruptcy Code[1] authorizes a trustee or debtor-in-possession to avoid and

[1] Unless otherwise stated, all statutory references herein are to the United States Bankruptcy Code, Title 11 of the United States Code.

recover certain transfers of property made by the debtor within 90 days preceding the commencement of a bankruptcy case, in order to nullify the preference that a debtor may give to one creditor to the detriment of other creditors shortly before bankruptcy ensues. The purpose of Section 547 is to "prevent favoritism among the debtor's creditors who ought in fairness to stand on the same footing." *See* 4 *Collier on Bankruptcy*, § 547.05 at 547-36 (Lawrence P. King ed., 15th ed. 1993). Section 547(c) sets forth several exceptions to the recovery of preferences, and in particular, Section 547(c)(2) sets forth the "ordinary course" exception, which excludes from recovery transfers made in the ordinary course of business. As with all such affirmative defenses, the transferee has the burden of proving the elements of the ordinary course defense. Section 547(g).

In order to avail itself of the ordinary course defense, a transferee must establish each of three requisite elements, which are stated in the conjunctive: That the debt was incurred in the ordinary course of the business of both the debtor and the creditor, Section 547(c)(2)(A); that the payment was made and received in the ordinary course of their respective businesses, Section 547(c)(2)(B); and that the payment was "made according to ordinary business terms," Section 547(c)(2)(C).

It is the last of those requirements, "made according to ordinary business terms," that is in question in this case involving the chapter 11 case of Unicom Computer Corporation ("Unicom"). As each Court of Appeals that has considered the matter has concluded, Section 547(c)(2)(C) requires a showing of ordinary business terms by objective standards. As discussed hereinbelow,

courts of appeals have required a showing that the transfer in question is consistent with the practices of companies other than the transferor and transferee within the relevant industry. In the case at bar, the Petitioner provided no evidence at all of any objective standards, industry-wide or otherwise.

Instead, the Petitioner produced evidence only of an intermittent practice between its local office and Unicom only, in deviation from IBM's established national policy. On that basis, both the District Court and the Court of Appeals concluded that the Petitioner had not satisfied its burden under the language of Section 547(c)(2)(C), and that, therefore, the Petitioner could not avail itself of the "ordinary course" defense as to 32 of the 40 transfers in question.

B. Pre-Bankruptcy Relationship

Unicom became a debtor under the provisions of chapter 11 of the Bankruptcy Code in 1988. [App.[2] 12.] In September 1990, Unicom filed suit against IBM in order to recover 40 payments made by Unicom to IBM within the 90 days preceding the commencement of the chapter 11 case, pursuant to the provisions of Section 547.

Unicom's payments to IBM arose out of a relationship pursuant to which Unicom purchased computer equipment and services from IBM for leasing to end-

---

[2] "App." refers to the Appendix attached to the Petition filed herein by IBM.

users throughout the country. [ERT.[3] 12:3-13:1.] Unicom was in the business of computer leasing, and it purchased much of its inventory from IBM. [*Id.*] Of the 40 payments in question, 28 represented payment for the sale of machinery requiring installation by IBM, and 12 represented payments for taxes, hourly services, publications, purchase of parts or performance under maintenance agreements, which did not require installation services by IBM. [ERE.[4] 41; ERE. 1-40; ERT. 7, App. 13.]

Invoices for the 12 transactions not involving installation all indicated that they were due upon receipt or within 30 days from invoice date. [ERE. 8, 9, 11, 17, 21, 30-33, 35, 36 and 39; ERT. 7.] Of those 12 payments, none satisfied the stated invoice terms, and all were made between 97 and 198 days after invoice date. [ERE. 41; ERT. 7.]

The payment terms set forth on the invoices for the 28 payments involving installation stated that payment was "due on the date of installation." [ERE. 1-7, 10, 12-16, 18-20, 22-29, 34, 37, 38 and 40; ERT. 7.] Notwithstanding that invoice language, IBM maintained a nationwide policy relating to the collection of invoices on purchases of new equipment by equipment lessors such as Unicom, allowing a grace period of up to 30 days after installation. [ERT. 18, 57, 58 and 70.] The policy had been instituted by

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[3] "ERT." refers to the Excerpts of Record: Trial Transcipt, filed by Unicom with the United States Court of Appeals for the Ninth Circuit on April 16, 1993.

[4] "ERE." refers to the Excerpts of Record: Trial Exhibits, filed by Unicom with the United States Court of Appeals for the Ninth Circuit on April 16, 1993.

IBM as a result of negotiations with a national trade association of computer lessors seeking additional time in which to arrange financing of equipment purchases. [*Id.*; ERT. 146:17-147:9.]

In a memorandum distributed to all of its branch managers, IBM's national office described its national grace period policy, and clarified that the 30-day grace period represented an absolute outer limit for tolerance of late payments:

> "The terms of our purchase contract state that payment is due upon installation. Our objective is to collect our monies at the time of installation or as soon as is practical after installation. Prior to the installation of purchased equipment, you should determine what constitutes a reasonable amount of time for the collection of monies due.
>
> Most invoices can and should be paid at or near installation. *In any event, payments should not exceed 30 days from the Date of Installation.*
>
> Does IBM give leasing companies different payment terms than commercial customers, that is, 30 days in which to pay purchase of new invoices? No. The terms of our purchase contract apply. Because of the additional paperwork required in a leasing company purchase of new transaction, we have agreed that *a reasonable amount of time should be no more than 30 days* to collect for a purchase transaction. *IBM expects payment earlier than 30 days.* Our evaluation of leasing company transactions indicates that *30 days is a reasonable maximum time for payment.*"

[ERE. 44; ERT. 9.] (Emphasis added.)

Of the 28 payments involving installation, only 8 were paid within 30 days of installation or within 30 days

after IBM mailed to Unicom a late installation notice. [ERE. 1, 2, 12-15, 18, 40 and 41; ERT. 7.] All other payments were made more than 30 days after installation or notice, and in some cases up to 184 days after installation. [ERE. 41; ERT. 7.]

C. Bankruptcy Court Trial and Decision

At the trial of the preference lawsuit in the United States Bankruptcy Court for the Northern District Of California, the elements of Unicom's case in chief were uncontested, and the trial dealt only with IBM's affirmative defenses. IBM raised three such defenses, a "contemporaneous exchange" defense under Section 547(c)(1), an argument that the transferred funds were not property of Unicom, involving Section 547(b), and an "ordinary course" defense under Section 547(c)(2). [App. 27.] The first two of those affirmative defenses were rejected by the Bankruptcy Court and are not at issue before this Court. [App. 27, 28.]

As to the third affirmative defense, a Section 547(c)(2) "ordinary course" argument, IBM presented no evidence that the payments in question were in the ordinary course of business in the context of industry practices. Unicom presented evidence of the national grace period policy instituted by IBM [ERE. 44; ERT. 9], allowing equipment lessors a payment grace period of up to 30 days after installation, and adduced evidence that the policy had resulted from negotiations between IBM and a nationwide equipment lessor association. IBM offered no evidence to refute the efficacy of the policy, nor did it offer any evidence that the corporate policy had been changed at any time.

Instead, IBM supported its "ordinary course" defense merely by presenting evidence of an intermittent local practice of one of IBM's regional offices, occasionally deviating from the clearly articulated national grace policy of IBM.

The local branch of IBM which handled Unicom collections was administratively managed by Sandra Santiago. [ERT. 55-56.] At trial, Ms. Santiago acknowledged that the national policy was that payment should never exceed 30 days after installation [ERT. 70:8-19] and that it was IBM's corporate policy that IBM expected payment earlier than 30 days. [ERT. 70:20-23.] Ms. Santiago testified that in some instances, Unicom was allowed to delay its payment until the end of the calendar month in which the 30-day deadline occurred. [ERT. 61.]

Ms. Santiago acknowledged that she did not know whether other local offices deviated from IBM national policy as well. [ERT. 70:24-71:3.] Significantly, Ms. Santiago testified that her office's practice of allowing payment beyond 30 days after installation was not the rule, and was applied only on an "occasional" basis. [ERT. 78:4-9.] Consistently, Larry Pulliam, IBM's sales manager for the San Francisco Bay Area, confirmed that the office in question allowed leasing customers more than 30 days only "occasionally." [ERT. 143:14-21.]

At the trial, IBM offered no evidence whatsoever to demonstrate that the local office's occasional practice had any nationwide, or industry-wide, application, or that the practice was applied consistently either with Unicom or with any other customer of IBM, much less among parties

other than IBM and Unicom. Further, evidence established that of the 40 payments in question, only 3 fit within the relaxed payment terms occasionally allowed by the local office, and that, in all, 15 payments satisfied neither IBM's national policy nor the local office's intermittent practice. [ERE. 41; ERT. 7.] IBM offered no evidence to explain or overcome that evidence.

The trial before the Bankruptcy Court occurred on September 24, 1991, and on the same date, the Bankruptcy Court prepared and filed its Memorandum of Decision. [App. 26-30.] In that decision, the Bankruptcy Court concluded that it was "absolutely clear and uncontradicted" that Unicom was contractually obligated to pay IBM upon installation, and that it was IBM's written policy to allow purchasers up to 30 days after installation to make payment, notwithstanding contractual terms. [App. 28.] The Bankruptcy Court further determined that "the local office handling [Unicom's] account always allowed purchasers up until the last day of the month following the month of installation to pay, notwithstanding the contract and the written policy . . . . " [App. 28.]

The Bankruptcy Court made no mention of the fact that IBM's own personnel had stated that their practice of allowing more than 30 days for payment was not the rule, but rather the exception, and the Bankruptcy Court made no statement as to the established facts that many of the payments in question did not even satisfy that attenuated and occasional practice. The Bankruptcy Court ruled entirely in IBM's favor, and judgment against Unicom was entered on October 3, 1991. [App. 31-32.]

D. District Court Opinion

Upon appeal to the United States District Court for the Northern District of California, the District Court reversed the Bankruptcy Court's decision as to 32 payments, and entered judgment in Unicom's favor in the amount of $801,405.24. [App. 21-23.] In its Memorandum Opinion dated July 15, 1992 [App. 11-20], the District Court found that while 8 transfers were made in the ordinary course of business pursuant to IBM's national policy, the other 32 transfers did not fall within the "ordinary course" affirmative defense and were therefore recoverable. [App. 19-20.]

The District Court found that the provisions of Section 547(c)(2)(C) required a showing that the payment in question was in the ordinary course of business by objective or industry standards [App. 16-17], and that no evidence had been presented by IBM concerning any such standards. [App. 18.] The District Court found that, at most, IBM had presented evidence of a local standard for computer lessors dealing with one office of IBM, but no standard that was industry-wide or that had been shown to be applied by companies other than IBM. [App. 19, ftnt. 6.] The District Court ruled that IBM's showing of compliance with an objective standard was "inadequate as a matter of law." [App. 19, ftnt. 6.]

The District Court concluded that the national grace period policy of IBM, by its inherent reasonableness, constituted a national policy of IBM and that payments that did not comport with that policy could not be construed as having been made according to ordinary business terms. [App. 19.] The District Court therefore ruled

that as to the 32 payments, IBM had not met its burden of proof that the payments in question were made according to ordinary business terms by objective standards, and that IBM's affirmative defense therefore failed with regard to those payments.

E. Court of Appeals Decision

IBM appealed from the District Court's decision to the United States Court of Appeals For The Ninth Circuit, and the Court of Appeals issued its decision on April 13, 1994. [App. 1-10.] In its unpublished decision, the Court of Appeals reconfirmed a prior holding that Section 547(c)(2)(C) requires a showing that the transfers at issue are ordinary in relation to prevailing business standards, and that, as such, the statute "requires proof that the challenged transfer was made pursuant to an *objective standard* based on practices common to businesses similarly situated to the debtor and transferee." [Memorandum, App. 6, quoting *In re Loretto Winery, Ltd.*, 107 B.R. 707, 709 (9th Cir. BAP 1989) (emphasis in original)].

The Court of Appeals observed that the only issue before it was whether IBM's previous "pattern of dealing" with Unicom was sufficient to satisfy the "ordinary business terms" requirement of Section 547(c)(2)(C). [App. 6.] In its analysis, the Court of Appeals concluded that IBM produced "virtually no evidence of an industry-wide standard beyond the 30-day grace period it had already negotiated with the trade association" [App. 7], and had at best shown that a local branch had allowed Unicom to pay its invoices well after they were due, and

that that same office had occasionally allowed other clients to do so as well. [App. 7-8.]

The Court of Appeals affirmed the District Court's conclusion, on the basis that the objective standard required by Section 547(c)(2)(C) had not been established or satisfied by IBM, and that, therefore, as to the 32 payments which the District Court had concluded were avoidable, IBM had failed to show by a preponderance of evidence that the payments fit within the "ordinary course" exception.

REASONS FOR DENYING THE WRIT

A. There Is No Conflict Among Decisions Of United States Courts Of Appeals With Respect To The Issue That Was Decisive In This Case.

Mindful no doubt of the provisions of Rule 10.1(a) of the Rules of the Supreme Court of the United States, pursuant to which a conflict among courts of appeals may be considered in deciding whether to review the decision of the Court of Appeals in this case, IBM contends in its Petition that there is a conflict among the holdings of courts of appeals with respect to decisive issues in this case. In fact, a review of pertinent decisions of courts of appeals reveals that there is no conflict at all with respect to the issue that was decisive in this case.

1. Objective Standard of Sec. 547(c)(2)(C)

In this matter, both the District Court and the Court of Appeals recognized and held that a transferee asserting the Section 547(c)(2) "ordinary course" defense must carry the burden of proof in demonstrating that the transfer in question satisfied an objective standard under the provisions of Section 547(c)(2)(C), in order to prevail. In particular, both such Courts concluded that in order to prove its "ordinary course" defense, IBM was required to demonstrate that the transfers in question were consistent with ordinary transactions within the relevant industry or with other companies similarly situated.

Both Courts concluded that IBM failed to establish any industry practice or practice of similarly situated companies, other than the 30-day grace period set forth in IBM's own manual. Inasmuch as the payments in question were not consistent with that grace period, both Courts concluded that IBM failed to show by a preponderance of evidence that the preferential transfers fit within the "ordinary course" exception.

The Courts' conclusion that the transferee must demonstrate consistency with an objective standard in order to satisfy the requirement of Section 547(c)(2)(C) is entirely consistent with the decisions of each court of appeals that has considered the matter. Each such court of appeals has concluded that Section 547(c)(2)(C) requires a showing that the transfer in question is made according to ordinary business terms as determined by objective industry standards.

2. No Conflict Among Circuits

For example, in *In re Fred Hawes Organization, Inc.*, 957 F.2d 239 (6th Cir. 1992), the Court of Appeals for the Sixth Circuit held, as it had in a prior published decision, that Section 547(c)(2)(C) requires a showing of ordinary business terms by an objective standard, in contrast to the requirement of Section 547(c)(2)(B), which requires such a showing by a subjective standard. The Court of Appeals stated that

> [t]he objective prong (subsection (C)) requires proof that the payment is ordinary in relation to the standards prevailing in the relevant industry. *WJM, Inc.*, 840 F.2d at 1010-11.

Id. at 244.

As pointed out by that Court of Appeals, to hold otherwise "would not only ignore the clear language of the statute, but would effectively render subsections (B) and (C) superfluous to each other." *Id.* Because subsections (B) and (C) are read in the conjunctive, each must be proven; the distinction between the two subsections is that subsection (B) refers to terms between the particular transferor and transferee, whereas subsection (C) makes no reference to those particular parties, thereby requiring a showing that is more general and objective than merely the relationship between the two parties in question. Moreover, as stated by the Sixth Circuit Court of Appeals, the objective standard is not satisfied by the transferee demonstrating its normal terms with other debtors, and instead requires demonstration of terms among other parties all together:

> [C]ourts do not look only at the manner in which one particular creditor interacted with other similarly situated debtors, but rather analyze whether the particular transaction in question comports with the standard conduct of business within the industry. [Citations omitted.]

Id. at 246.

Similarly, the Court of Appeals for the Seventh Circuit, in *Matter of Tolona Pizza Products Corp.*, 3 F.3d 1029 (7th Cir. 1993), has clearly determined that Section 547(c)(2)(C) requires a showing of ordinary business terms within the relevant industry. Through the same analysis of Sections 547(c)(2)(B) and (C), the Seventh Circuit Court of Appeals concluded that the only reasonable interpretation of Section 547(c)(2)(C) is that it requires satisfaction of an objective test for ordinary business terms:

> The functions that we have identified, combined with a natural reluctance to cut out and throw away one-third of an important provision of the Bankruptcy Code, persuade us that the creditor must show that the payment he received was made in accordance with the ordinary business terms in the industry. . . .

Id. at 1032-1033.

The Eighth Circuit Court of Appeals has come to the same conclusion. In *In re U.S.A. Inns of Eureka Springs, Arkansas*, 9 F.3d 680 (8th Cir. 1993), that Court of Appeals held that Section 547(c)(2)(C) requires proof of an objective industry practice, *Id.* at 684, specifically necessitating "evidence of a prevailing practice among similarly situated

members of the industry facing the same or similar problems." *Id.* at 685. The Tenth Circuit Court of Appeals too has held that the "ordinary business terms" referenced in Section 547(c)(2)(C) "are those used in 'normal financing relations': the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy." *In re Meredith Hoffman Partners*, 12 F.3d 1549, 1553 (10th Cir. 1993).

In *In re Molded Acoustical Products, Inc.*, 18 F.3d 217 (3rd Cir. 1994), the Third Circuit Court of Appeals adopted the view of the Seventh Circuit Court of Appeals, with some "embellishment," concluding that the words "ordinary business terms" in Section 547(c)(2)(C) refer to a range of terms encompassing practices in which firms within the same industry engage. *Id.* at 220. Thus, that circuit court as well has accepted the interpretation of Section 547(c)(2)(C) requiring application of an objective standard. It is noteworthy that in its decision, the Third Circuit Court of Appeals pointed out that evidence of how the transferee dealt with only one company other than the debtor is not evidence of industry terms, and is insufficient as a matter of law to satisfy the standard required by Section 547(c)(2)(C). *Id.* at 221.

The Fourth Circuit Court of Appeals in *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992), implicitly accepted the prevailing interpretation of Section 547(c)(2)(C) that requires the showing of an objective standard, by comparing the dealings of the debtor and transferee in that case to similar transactions involving other parties. *Id.* at 488.

The Eleventh Circuit Court of Appeals dealt with the Section 547(c)(2) "ordinary course" defense in its decision in *In re Craig Oil Company*, 785 F.2d 1563 (11th Cir. 1986). However, in that case, the Court concluded that the transfers in question were extraordinary even in the context of normal payment terms between that particular debtor and transferee, particularly in light of the fact that the payments were late, were made following collection efforts by the transferee and were made by cashier's checks, an unprecedented mode of payment for those parties.

Because the payments were unusual even within the particular parties' relationship, they failed to satisfy the subjective standard of Section 547(c)(2)(B), and there was no need to look further. That is, because the requirements of Sections 547(c)(2)(A), (B) and (C) are conjunctive, and because the transfers in that case failed to satisfy even the subsection (B) standards as to normal dealings between the parties, there was no need to inquire as to satisfaction of the objective standards of subsection (C). The Court of Appeals for the Eleventh Circuit did not discuss whether Section 547(c)(2)(C) compels an objective test.

Thus, there is no conflict at all among any of the courts of appeals as to the interpretation of Section 547(c)(2)(C). Almost all of those courts of appeals have expressly held that Section 547(c)(2)(C) requires a showing that the transfer in question is ordinary by objective industry standards, and those courts of appeals that have not so held explicitly have either reached the same conclusion implicitly or have not addressed the issue at all. In particular, contrary to IBM's assertions in its Petition,

the Eleventh Circuit Court of Appeals, in *Craig Oil Company*, has *not* concluded that "subsection (C) may be satisfied solely by evidence bearing on prior dealings between the parties," [Petition, p. 10], but has simply not confronted the issue since the transfers in question failed to satisfy other concurrent tests as well.

As a result, it is clear that any court of appeals entertaining the facts presented by IBM and Unicom in this case would rule in the same manner as did the Ninth Circuit Court of Appeals. Section 547(c)(2)(C) requires the transferee to demonstrate that the transfers are ordinary by industry standards, and that is decisive in this case. IBM presented no evidence of industry standards other than the national 30-day grace period set forth in IBM's own manual, and all of the payments in question clearly ran afoul of that policy. Rather than present any evidence of a contrary industry practice or policy, IBM simply provided evidence of an intermittent and exceptional practice within one local office of IBM, dealing with only Unicom and other occasional customers. Thus, IBM's proof failed as a matter of law, and would have so failed before any other court of appeals in the nation. The Court of Appeals' decision in this case rests on a decisive issue as to which there is no conflict among courts of appeal.

3. IBM's Purported Conflict

In its Petition, IBM argues that there are conflicts among the courts of appeals with respect to issues relevant to the case at bar. As demonstrated above, that is not so. In fact, the conflict discussed in IBM's Petition involves not the issue before the Courts in this matter, but rather extraneous issues that are neither decisive nor relevant to the case at bar.

The differences of opinions among the courts of appeals identified in the Petition deal not with whether Section 547(c)(2)(C) requires an objective standard – all courts agree that it does. Rather, the conflict involves the method of determining that objective standard. For example, the decisions identified by IBM concern how broad a range of industry practices may be applied, the parameters of the relevant industry and the extent to which nonconformance with industry practices must be measured. None of the cases dispute the basic requirement that the objective standard, however measured, be applied and satisfied.

Thus, the conflicts among the courts of appeals identified in the Petition have no relevance to the case at bar. In the present case, there is no issue as to which industry practice or objective standard to apply, because only one was presented. Only IBM's national 30-day grace policy is in evidence, and none of the transfers in question comply with that policy.

The only other evidence presented by IBM concerns an intermittent exceptional practice of one local office of IBM, and under none of the courts of appeals' decisions

would that occasional practice be interpreted to be an objective standard. Although IBM characterizes that office's practice as a "regional industry practice," it falls far short of that mark: There was no evidence to show that even the local office applied that practice regularly, as its own employees described it as an "occasional" practice, and there is in fact no evidence that any company other than IBM applied that practice, or even that IBM itself applied the practice on a regular or consistent basis with companies other than Unicom. As pointed out by the Third and Sixth Circuits Courts of Appeals, evidence of how a transferee dealt with only one company, or even with many other companies, is insufficient as a matter of law to satisfy the standard required by Section 547(c)(2)(C). *Molded Acoustical Products,* 18 F.3d at 221; *Fred Hawes Organization,* 957 F.2d at 246.

Clearly, therefore, there is no conflict among the courts of appeals with respect to the decisive logic in this case, to wit, that Section 547(c)(2)(C) requires compliance with an objective industry standard, and that IBM failed in its proof in that regard.

B. There Are No Other Reasons For Review Of The Court Of Appeals' Decision In This Case.

Just as there is no conflict among courts of appeals that needs to be resolved by this Court, there are no other reasons for review of the decisions in this case. Whereas IBM argues that the Court of Appeals' decision in this case "has shackled creditors to a uniform industry-wide debt collection standard" [Petition, p. 17], the Court of Appeals' decision is far more restricted than that.

First, it should be noted that the Court of Appeals' ruling has not been published, and therefore has little or no impact upon other litigants or commercial transactions. In fact, the Court of Appeals' decision not to publish the ruling evidences its own sense that the ruling has little precedential value and is narrowly limited to the evidence existing in the case at bar.

Second, nothing in the Court of Appeals' ruling suggests, as IBM argues, that that Court requires a "uniform industry-wide debt collection standard." The simple fact is that the only policy or standard in evidence in this case was IBM's national policy published in its manual, allowing for a 30-day grace period. IBM did not refute the evidence of that policy, nor did it present evidence of any other industry practice or policy, whether uniform or otherwise. All that IBM did present was the intermittent practice of one of its own local offices, and that cannot be considered industry-wide or even regional. The practice was shown to apply only to occasional customers of that one office, and was not shown to be used regularly (even if not uniformly) by that office or any other office of IBM, much less by other vendors within the industry. Stated simply, the case did not involve a battle between a uniform industry-wide policy and a regional policy, because there was only evidence of an industry-wide policy and no evidence at all of a regional policy.

As a result, the dire predictions of IBM with respect to desperate searches for "rigid" industry standards and antitrust violations do not at all follow from the decision of the Court of Appeals in this case, and there are no reasons for this Court to accept review of the matter.

CONCLUSION

Based upon the foregoing, the Respondent respectfully submits that the petition for a writ of certiorari submitted by IBM should be denied.

Dated: September 27, 1994

Respectfully submitted,

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